

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

RODERICK BROWN,	:	MOTION TO VACATE
BOP No. 54662-019,	:	28 U.S.C. § 2255
Movant,	:	
	:	CIVIL ACTION NO.
v.	:	1:10-CV-666-CC
	:	
UNITED STATES OF AMERICA,	:	CRIMINAL ACTION NO.
Respondent.	:	1:03-CR-209-2-CC

ORDER

This matter is before the Court on a Final Report, Recommendation and Order (“Final R&R”) [227], Roderick Brown’s Objections [230], and Brown’s “Supplemental Objections” (which include various motions) [232]. For the following reasons, this Court (a) overrules Brown’s objections, (b) approves and adopts the Final R&R as the Order of the Court, as supplemented herein, and (c) denies Brown’s motions.

As this Court has previously explained to Brown, *see* [220 at 4], “[p]arties filing objections must specifically identify those findings objected to.” *Marsden v. Moore*, 847 F.2d 1536, 1548 (11th Cir. 1988). “Frivolous, conclus[ory] or general objections need not be considered by the district court.” *Id.* (citation omitted).

[A] party that wishes to preserve its objection must clearly advise the district court and pinpoint the specific findings that the party disagrees with This rule facilitates the opportunity for district judges to spend more time on matters actually contested and produces a result compatible with the purposes of the Magistrates Act.

United States v. Schultz, 565 F.3d 1353, 1360-61 (11th Cir. 2009) (internal quotation marks and citation omitted). The Court has the discretion to decline to consider arguments that were not raised before the magistrate judge. *Williams v. McNeil*, 557 F.3d 1287, 1292 (11th Cir. 2009). Indeed, a contrary rule “would effectively nullify the magistrate judge’s consideration of the matter and would not help to relieve the workload of the district court.” *Id.* (quoting *United States v. Howell*, 231 F.3d 615, 622 (9th Cir. 2000)).

Bearing that in mind, the Court has conducted a “careful and complete review” of the Final R&R. *Williams v. Wainwright*, 681 F.2d 732, 732 (11th Cir. 1982) (quoting *Nettles v. Wainwright*, 677 F.2d 404, 408 (5th Cir. Unit B 1982) (en banc)). As to those portions to which no specific objection was made, the Court has found no clear error. *See Macort v. Prem, Inc.*, 208 F. App’x 781, 784 (11th Cir. 2006).¹ As

¹ *Macort* addressed only the standard of review applied to a magistrate judge’s factual findings; however, the Supreme Court has held that there is no reason for the district court to apply a different standard of review to a magistrate judge’s legal conclusions. *Thomas v. Arn*, 474 U.S. 140, 150, 106 S. Ct. 466, 88 L. Ed. 2d 435 (1985). Thus, district courts in this circuit have routinely applied a clear-error standard to both. *See Tauber v. Barnhart*, 438 F. Supp. 2d 1366, 1373-74 (N.D. Ga. 2006)

to those portions to which specific objection was made, the Court has made “a *de novo* determination of those portions of the report or specified proposed findings or recommendations.” 28 U.S.C. § 636(b)(1)(C); *see also Jeffrey S. v. State Bd. of Educ. of Ga.*, 896 F.2d 507, 512 (11th Cir. 1990) (a district judge must “give fresh consideration to those issues to which specific objection has been made by a party”).

Having conducted that review, the Court concludes that the thirty-four page Final R&R addresses each of the seven grounds for relief stated in Brown’s amended § 2255 motion [182] and one raised in a later filing, and explains clearly why relief should be denied because each such ground was (1) addressed on direct appeal, (2) waived by Brown’s waiver of his appeal/collateral attack rights in a negotiated, written plea agreement, and/or (3) meritless based on the record. Accordingly, the Final R&R – including the recommendation that a certificate of appealability be denied – is hereby **ADOPTED** and **APPROVED** as the Order of the Court, as supplemented herein.

Because Brown’s § 2255 motion is based on his fundamental misconception that he was charged with a “non-offense” and is “actually innocent” of the firearms crime for which he remains in prison, it is worth noting the following.

(collecting cases).

Federal law provides that “any person who, during and in relation to . . . a drug trafficking crime . . . uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm” shall be guilty of a crime. 18 U.S.C. § 924(c)(1)(A). Thus, it is criminal *either* to (1) use or carry a firearm during and in relation to a drug trafficking crime *or* (2) possess a firearm in furtherance of a drug trafficking crime.

It is indisputably true that the indictment in this case was poorly drafted and that it conflated the two separate prongs of § 924(c)(1)(A). It is equally true, however, that Brown admitted at his change of plea hearing to conduct that “clearly falls within and establishes *both* of § 924(c)’s prongs.” *United States v. Brown*, 346 F. App’x 481, 490 (11th Cir. 2009) (emphasis added).² Although Brown now contends that “not only was the [Eleventh Circuit] panel [that decided his direct appeal] incorrect, it missed the point altogether” [182 at 11], that panel in fact applied *United States v.*

² Brown admitted to the following:

(1) the government arranged a controlled drug transaction through Gwendolyn Brown, a woman to whom Brown had previously sold drugs; (2) immediately after the phone call with Gwendolyn Brown, officers saw Brown leave his apartment with a paper bag and enter his car; (3) officers stopped Brown in his vehicle just before he got to the interstate exit where Gwendolyn Brown was supposed to be waiting; and (4) a search of Brown’s vehicle recovered the paper bag he had been seen carrying, which contained 725 grams of powder cocaine, and a Taurus .357 caliber revolver.

United States v. Brown, 346 F.App’x 481, 490 (11th Cir. 2009).

Peters, 310 F.3d 709 (11th Cir. 2002), and determined that “[i]n Brown’s case, the indictment defect was an omission of an element of the charged crime and not an affirmative allegation of conduct beyond the reach of the charging statute.” *Brown*, 346 F. App’x at 490. Thus, the panel concluded, Brown was *not*, as in *Peters*, charged with a “non-offense.” Rather, because Brown otherwise had “adequate notice of the charge against him” and “admitted to conduct that established the omitted element of the charged crime,” the indictment defect was non-jurisdictional and did not deprive this Court of “power to adjudicate Brown’s case or to accept Brown’s guilty plea.” *Id.* Thus, although Brown is correct that the indictment “does not properly state a federal crime” [182 at 10], he was *not* charged with a “non-offense” and he is *not* “actually innocent” of having violated § 924(c)(1)(A).

While Brown’s trial attorney could have challenged the indictment as defective, that would not have led to dismissal of the case, only to Brown’s re-indictment. And given Brown’s actual guilt under *both* prongs of § 924(c)(1)(A), there is no reason to believe – let alone a “reasonable probability” – that he would not have pled guilty to that corrected, superseding indictment. *See Hill v. Lockhart*, 474 U.S. 52, 59, 106 S. Ct. 366, 88 L. Ed. 2d 203 (1985) (requiring “defendant [to] show that there is a reasonable probability that, but for counsel’s errors, he would not have pleaded guilty

and would have insisted on going to trial”). Indeed, Brown would have been unwise to reject the plea deal he accepted, under which the government agreed to drop a § 924(c)(1)(C) count that carried an additional twenty-five year mandatory minimum sentence, required to be imposed consecutively, which would have increased the 15-year sentence Brown received, as part of his plea deal, to a 40-year sentence, if he was convicted at trial. *See* [227 at n.2].

To the extent that Brown argues that his entry into a plea agreement was “unknowing” because “this court, trial counsel, and the government all misinformed him or failed to explain to him the exact real nature of the [§ 924(c)(1)(A)] charge” [182 at 8-9], that contention, too, gets Brown nowhere. Again, while the indictment conflated the elements from the two separate prongs of a § 924(c)(1)(A), Brown was *not* “misinformed” that he was, indeed, guilty of a § 924(c)(1)(A) offense. At his Rule 11 hearing, Brown admitted to conduct that violated *both* prongs of § 924(c)(1)(A).

Brown now cites *Bousley v. United States*, 523 U.S. 614, 118 S. Ct. 1604, 140 L. Ed. 2d 828 (1998), but that case offers him scant support. After stating that a procedural default of a federal habeas corpus claim may be overcome by a showing of either “cause and prejudice” or “actual innocence, the Supreme Court further explained that “[a]ctual innocence” means factual innocence, not mere legal

insufficiency” and that “[i]n cases where the Government has forgone more serious charges in the course of plea bargaining, petitioner’s showing of actual innocence must also extend to those charges.” *Id.* at 623-24. Not only is Brown *not* “actually innocent” of the § 924(c)(1)(A) charge to which he pled guilty, but he has never alleged – let alone shown – any basis for concluding that he is “actually innocent” of the additional charges the government dropped in exchange for his guilty plea.

Brown’s objections that the magistrate judge “has issued a Report and Recommendation that fails to address any of Brown’s state court claims” [232-1 at 10] are meritless. Brown’s drug trafficking sentences in this case were enhanced under 21 U.S.C. § 851 based on two state criminal convictions dating back to the 1980s, neither of which Brown challenged during sentencing. *See* [64]. Brown alleges that he belatedly filed in 2006 a state habeas corpus petition seeking vacatur of those state convictions. *See* [214 at 2].³ However, Brown also acknowledges that the Georgia courts *denied* his vacatur requests. [*Id.* at 3]. Thus, this is not a case that requires the Court to apply *Johnson v. United States*, 544 U.S. 295, 125 S. Ct. 1571, 161 L. Ed. 2d

³ Brown also alleges that he put Georgia on notice in 2005 that he intended to seek vacatur. *See Brown v. Georgia* [1 at 19]. But he does not allege that he ever sought vacatur before then.

542 (2005). Nor has Brown cited any precedent that might entitle him to relief in this § 2255 proceeding.⁴

The various motions that Brown included in his “Supplemental Objections,” *see* [232-1 at 10], are **DENIED**.

⁴ To the extent that Brown complains that the Honorable Orinda D. Evans ought not to have recharacterized his petition in *Brown v. Georgia*, No. 1:09-CV-3703 (N.D. Ga. Dec. 31, 2009), as a second § 2255 motion rather than an original § 2254 petition, it is plain that Judge Evans was correct. *See McCarthy v. United States*, 320 F.3d 1230, 1231 n.1 (11th Cir. 2003) (an attack on “expired state convictions . . . that were used to enhance [a] current federal sentence[] . . . [must be brought] as a challenge under 28 U.S.C. § 2255 rather than 28 U.S.C. § 2254”). Moreover, even if Brown’s original filing in *Brown v. Georgia* could have been treated as a § 2254 petition, nothing in it indicates any basis on which it might have been determined to have been brought within the one-year limitations period applicable to § 2254 petitions. *See* 28 U.S.C. § 2244(d). Rather, if treated as a § 2254 petition, Brown’s filing would have been subject to summary dismissal because it plainly appears that it was filed far out-of-time. *See* 28 U.S.C. foll. § 2254, Rule 4. *Cf. Brown v. Georgia* [1 at 6] (acknowledging that Georgia rejected the state habeas petition filed by Brown in 2006 to attack his mid-1980s convictions as untimely under Georgia’s four-year limitations period). In any event, after Brown was directed to *amend* his filing in *Brown v. Georgia* to list *all* grounds on which he would seek relief under § 2255, Brown omitted any further mention of his state convictions. *See* [182]. And, in later filings in this § 2255 proceeding, Brown listed *only* the seven grounds for relief set forth in his amended § 2255 motion, without any mention of “state court claims.” *See, e.g.,* [192 at 2]. Only *after* the government filed its Response [222], addressing each of the seven grounds in Brown’s amended § 2255 motion [182], did Brown assert in his Reply that “arguments concerning his state conviction that was dismissed by the Georgia Supreme Court” [223 at 5-6] – which he omitted from his amended § 2255 motion – had to be addressed. As a general rule, arguments raised for the first time in reply are waived. *United States v. Levy*, 416 F.3d 1273, 1276 n.3 (11th Cir. 2005); *Jackson v. United States*, 976 F.2d 679, 680 n.1 (11th Cir. 1992).

IT IS SO ORDERED, this 20th day of August, 2013.

s/ CLARENCE COOPER
CLARENCE COOPER
UNITED STATES DISTRICT JUDGE